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Report of the International Law Commission on the work of its fifty-ninth session (2007)

Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-second session, prepared by the Secretariat

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Introduction

1. At its sixty-second session, the General Assembly, on the recommendation of the General Committee, decided at its 3rd plenary meeting, on 21 September 2007, to include in its agenda the item entitled "Report of the International Law Commission on the work of its fifty-ninth session" and to allocate it to the Sixth Committee.

2. The Sixth Committee considered the item at its 18th to 26th and 28th meetings, from 29 to 31 October and on 1, 2, 5, 6 and 19 November 2007. The Chairman of the International Law Commission at its fifty-ninth session introduced the report of the Commission:[1] chapters I to III, VI to VIII and X at the 18th meeting, on 29 October; and chapters IV, V and IX at the 22nd meeting, on 1 November. At the 28th meeting, on 19 November, the Sixth Committee adopted draft resolution A/C.6/62/L.18, entitled "Report of the International Law Commission on the work of its fifty-ninth session". The draft resolution was adopted by the General Assembly at its 62nd plenary meeting, on 6 December 2007, as resolution 62/66.

3. By paragraph 27 of resolution 62/66, the General Assembly requested the Secretary-General to prepare and distribute a topical summary of the debate held on the report of the Commission at the sixty-second session of the Assembly. In compliance with that request, the Secretariat has prepared the present topical summary.

4. The document consists of seven sections: A. Reservations to treaties; B. Shared natural resources; C. Expulsion of aliens; D. Effects of armed conflicts on treaties; E. Responsibility of international organizations; F. The obligation to extradite or prosecute (*aut dedere aut judicare*); and G. Other decisions and conclusions of the Commission.

Topical summary

A. Reservations to treaties

1. General remarks

5. Delegations underlined that they attached great value to the topic and that the Commission's consideration of issues concerning the formulation and withdrawal of acceptances and objections and the procedure for acceptances of reservations and its elucidation of guidelines relating to various aspects of the "object and purpose" of a treaty shed light on several important procedural questions. They indicated that they looked forward to the Commission addressing the question of the consequences of reservations considered incompatible with the object and purpose of a treaty. At the same time, it was observed that the guide to practice should retain a clear and concise form and the Commission should refrain from providing too many details, especially in the commentaries. It was also indicated that the comments made at the Commission's meeting with human rights experts were useful for the consideration of the effects of null and void reservations on treaty relations between the reserving

[1] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10).

State and other contracting States. Some delegations expressed support for the reservations dialogue, noting that it could be of significant assistance in clarifying the legal position with regard to reservations and their relationship to a specific treaty.

6. Some delegations also expressed support for guidelines related to acceptance of reservations although it was unnecessary to make too much of the distinction between a tacit acceptance and an implicit acceptance.

7. Concern was expressed by some other delegations at the suggestion that third parties (such as human rights treaty bodies) might be able to make objections, particularly when they were not granted competence to do so under their constitutive instruments.

8. The point was also made that the formulation of objections could also be approached on a case-by-case basis, taking into account both principles and practical considerations. It was suggested that any State that objected to a reservation formulated by another State should give the reasons for its objections which should be compatible with article 19 of the Vienna Convention on the Law of Treaties.

9. It was also stated that objections should not be subject to a time limit, in particular objections concerning compatibility with the object and purpose of a treaty should not be regarded as subject to the time limits set out in article 20 (5) of the Vienna Convention. Some doubts were expressed about the wisdom of establishing a single regime for acceptance of reservations and objections thereto. The point was made that some guidelines suggested in the Special Rapporteur's eleventh and twelfth reports (A/CN.4/574 and A/CN.4/584) should apply only to reservations that had passed the test of validity.

10. Several delegations underlined the fact that comprehensive guidelines would discourage States from formulating invalid reservations. The view was expressed that when a reservation had not been objected to, a State could not later retract its acceptance. Such a retraction could jeopardize legal certainty.

11. It was also stated that late reservations remained a source of concern and that they should not be considered valid because no State had objected to such reservations.

12. Some delegations suggested that particular attention should be given to the situation of treaties with a limited number of participants and to the effect of reservations in such a situation. In particular, a more clear-cut determination of the status of reservations to bilateral treaties would be instructive.

13. The effects of objections differed, depending on the nature of the treaty. The author of an objection had the right to oppose the entry into force of the treaty between itself and the reserving State but should clearly express its intention to do so. It was observed that a State objecting to a reservation should not exclude from its treaty relations with the reserving State provisions that were not related to the reservation. The view was expressed that intermediate or "super-maximum" effect of objections to valid reservations should not be recognized, since it would remove any distinction between the effects produced by an objection to a valid reservation and those produced by an objection to an invalid reservation. It was also pointed out that if the objecting State could influence arbitrarily the treaty relations between

itself and the reserving State, the stability of the reservations system could be undermined.

14. Some delegations stressed that the admissibility of reservations rested on the objective criterion of the object and purpose of the treaty which constituted the minimum threshold for the validation of a reservation and could be found in the substantive part of the agreement itself. The genuine meaning of purpose and object should be construed in the light of each case. The view was expressed that the 1951 advisory opinion of the International Court of Justice on reservations to the Convention on the Prevention and Punishment of the Crime of Genocide was still of practical value.

15. Some delegations stated that all States becoming parties to a treaty should commit themselves to its object and purpose. Central provisions could not be nullified through reservations. Such reservations should be considered null and void, as indicated clearly in article 19 of the Vienna Convention on the Law of Treaties. Objections were not necessary to establish that fact. Treaty monitoring bodies played a special role in that regard but unless there was a body authorized to qualify a reservation as invalid, objections still played an important role.

16. The point was made that there should be no attempt to go beyond the terms of the Vienna Convention by defining the object and purpose of a treaty because the resulting provisions might be misleading or unsupported by State practice. In the absence of any specific rules within a particular treaty regime, the principle of State consent should prevail. It was for the State parties to determine the validity and the consequences of the invalidity of a reservation.

17. The view was expressed that a distinction should be drawn between reservations that were incompatible with the object and purpose of the treaty or were prohibited by the treaty and reservations against which States formulated objections for other reasons. In the first case either the consent to be bound of the reserving State was invalidated and consequently the reservation and the objection prevented the entering into force of a treaty between the two States or the invalid reservation was considered non-existent and the treaty therefore entered into force between the two States. State practice in that area varied. Such reservations should not be subject to a system of acceptance provided for in article 20 (4) of the Vienna Convention. On the other hand, an objection to a reservation that was compatible with the object and purpose of the treaty should not prevent the application of the other provisions of the treaty between the two States.

2. Comments on the draft guidelines

(a) Guideline 2.6.3 — Freedom to make objections

18. The right or option (rather than the freedom) to make (or formulate) objections to reservations was supported. It was considered useful to set no limit on the reasons for making such objections, it being understood that they must be in accordance with the Vienna Convention and general international law. The position was based on the principle that a State could not be bound without its consent.

19. It was observed that States had the "option" rather than the freedom to formulate an objection to a reservation, irrespective of the incompatibility of the reservation with the object and purpose of the treaty.

(b) Guideline 2.6.5 — Author of an objection

20. It was stated that the phrase "[a]ny State and any international organization that is entitled to become a party to the treaty" meant signatory States and international organizations; States or international organizations that have no intention of becoming a party to a treaty should not have the right to object to a reservation made by a State party. It was also pointed out that it was difficult to determine which States or organizations had the intention of becoming parties to a treaty.

(c) Guideline 2.6.7 — Written form and guideline 2.6.8 — Expression of intention to oppose the entry into force of the treaty

21. It was observed that the guidelines imparted clarity to international relations. The view was expressed that the definition of the term "written form" should take account of the significant developments of communications in recent years. Any form of communication dependent on the written word could be considered to be "written" although it should always be confirmed by the subsequent traditional exchange of letters.

(d) Guideline 2.6.10 — Statement of reason

22. Support was expressed for the guideline. However, it was stated that it would be appropriate to insert guidelines recommending that States should also explain their reasons for withdrawing an objection and also the reasons for their reservations to international treaties.

23. It was stated that the guideline could contribute to the dialogue between the reserving State and those called upon to assess the validity of the reservation.

(e) Guideline 2.6.12 — Non-requirement of confirmation of an objection made prior to the expression of consent to be bound by a treaty

24. The suggestion was made that the guideline be amended in order to require States and international organizations to confirm, at the time when they became parties to a treaty, any objections that they had made prior to the expression of their consent to be bound, since considerable time might have passed in the interim.

25. It was observed that the guideline should instead provide that a declaration made previously must be confirmed in order to be regarded as an objection and that unconfirmed "objections" should be regarded as mere declarations.

(f) Guideline 2.6.13 — Time period for formulating an objection

26. It was suggested that the words "by the end of a period" should be replaced by "within the period".

(g) Guideline 2.6.14 — Pre-emptive objections

27. Some doubts were expressed with regard to pre-emptive objections. It was said that the guidelines could give rise to confusion between political or interpretative declarations and declarations intended to provide a specific legal effect or encourage States to increase the number of their declarations with uncertain legal effects. The view was thus expressed that the guideline was unacceptable, since it would also

require States and international organizations to wait until a reservation was made in order to determine its extent before deciding whether to object to it.

28. It was also wondered whether pre-emptive objections were true objections; rather they seemed to be declarations of principle or interpretative declarations. The term "preventive objecting declarations" was proposed instead.

(h) Guideline 2.6.15 — Late objections

29. It was observed that the current text of the guideline was too brief and general and should be reconsidered, although some delegations agreed that they did not have legal effects. Late objections might produce certain legal effects which should be specified. It was suggested that late objections should rather be considered as interpretative statements and referred to as "objecting communications". Thus late objections should be governed, mutatis mutandis, by the regime governing interpretative declarations.

(i) Guideline 2.7.4 — Effect of withdrawal of an objection

30. The question was raised as to whether a State entitled to become party to a treaty that has formulated a pre-emptive objection to a reservation and subsequently, while still not a party to the treaty, withdraw it, should be considered to have accepted the reservation and therefore lose the right to formulate an objection during the period from the date of signature to its expression of consent to be bound by the treaty.

(j) Guideline 2.7.9 — Prohibition against the widening of the scope of an objection to a reservation

31. Although several delegations supported the guideline, it was pointed out that the Commission should consider the question of how States and international organizations should act in the case where a reservation, as a result of subsequent practice, acquired a completely different meaning from that which it had had at the time of its formulation. Also the reasons for such prohibition should be clarified.

(k) Guideline 2.8.2 — Tacit acceptance of a reservation requiring unanimous acceptance by the other States and international organizations

32. It was stated that the guideline should be amended to better reflect article 20 (5) of the Vienna Convention to the effect that objections could be made either within the 12-month period or by the date on which the State or international organization expressed its consent to be bound by the treaty, whichever was later.

33. It was also indicated that the guideline in allowing States not yet parties to a treaty to accept a reservation was inconsistent with draft guideline 2.8 according to which only contracting States or international organizations could accept a reservation.

(l) Guideline 2.8.9 — Organ competent to accept a reservation to a constituent instrument

34. It was indicated that the draft guideline should be understood to be all-encompassing since the internal framework might differ from organization to organization.

(m) Guideline 2.8.11 — Right of members of an international organization to accept a reservation to a constituent instrument

35. The view was expressed that the right of members of an international organization to take a position on the validity of a reservation continued to have legal effects since the opinion thus expressed could contribute to the reservations dialogue while at the same time nothing prevented States from objecting to a reservation already accepted by the organization concerned. Some doubts were also expressed on the inclusion of the guideline since there was a risk that it might lead to interference with the exercise of the powers of the competent organ of the organization and respect for the proper procedures. According to another view, the guideline required further consideration.

(n) Guideline 3.1.5 — Incompatibility of a reservation with the object and purpose of the treaty

36. The view was expressed that it was almost impossible to define the object and purpose of a treaty not least because of its subjective character. The definition in draft guideline 3.1.5 was generally perceived to be a laudable attempt. It could however be asked whether there existed elements of a treaty that were essential but not necessary to its general thrust or whether an element was essential only because it was necessary to the treaty's general thrust.

37. According to another view, in addition to defining the object and purpose of a treaty, consideration should be given to different types of treaties.

(o) Guideline 3.1.6 — Determination of the object and purpose of the treaty

38. It was stated that there were uncertain terms in the draft guideline (for example "when appropriate"). The question also arose as to who decided whether or under what circumstances additional elements would be taken into account. It was also suggested that the order of guidelines 3.1.5 and 3.1.6 should be reversed.

(p) Guideline 3.1.7 — Vague or general reservations

39. The point was made that it was not appropriate to formulate independent guidelines in respect of the content of draft guidelines 3.1.7, 3.1.9 and 3.1.10.

40. Although agreement was expressed by some other delegations with draft guideline 3.1.7, there were some doubts as to its practical application, as well as the consequence of non-compliance with its provision. It was also pointed out that the guideline was too "radical", disqualifying all vague or general reservations, when some alternatives as a "reservations dialogue" should be offered.

41. The point was made that while reservations contrary to a rule of *jus cogens* usually went against the object and purpose of the treaty, vague or general reservations and reservations to provisions relating to non-derogable rights did not necessarily contravene the object and purpose of the treaty and should be judged on a case-by-case basis.

42. According to another view, the guideline seemed misplaced since it concerned form rather than compatibility with the object and purpose of the treaty.

43. It was suggested that an additional criterion should be that the interests of the other contracting parties should be protected where a reservation was susceptible to

a number of possible interpretations. In other words, the reservation should be interpreted against the reserving State and in favour of the other contracting parties.

(q) Guideline 3.1.8 — Reservations to a provision reflecting a customary norm

44. The view was expressed that the guideline could introduce some confusion as to the source of the obligation (treaty provision or customary norm) between the reserving State and the other contracting States. Accordingly, it should be reconsidered and clarified. Moreover, paragraph 1 appeared to be redundant; the gist of the draft guideline was in paragraph 2.

(r) Guideline 3.1.9 — Reservations contrary to a rule of *jus cogens*

45. It was stated that the guideline could be interpreted as an application of the principle that States could not conclude a treaty that conflicted with a peremptory norm of general international law embodied in articles 53 and 64 of the Vienna Convention. However, it was not clear how a conflict between a reservation and a peremptory norm should be settled.

(s) Guideline 3.1.10 — Reservations to provisions relating to non-derogable rights

46. The view was expressed that the yardstick for the admissibility of a reservation to a non-derogable right should be the specific provisions entailing that right rather than the entire treaty.

(t) Guideline 3.1.11 — Reservations relating to internal law

47. It was pointed out that it was easier to establish a possible incompatibility with the object and purpose only if the national norm was spelled out in the text of the reservation. A "reservations dialogue" would be helpful in order to assess that effect.

48. According to another point of view the guideline seemed superfluous, in view of the general rule in article 19 (c) of the Vienna Convention.

(u) Guideline 3.1.12 — Reservations to general human rights treaties

49. It was stated that human rights treaties should not be treated any differently from other international agreements and that reservations to normative treaties, including human rights treaties, should be subject to the same rules as reservations to other types of treaties. However, the point was made that some exceptions might be necessary.

50. Moreover, it was unclear whether the guideline constituted a *lex specialis* to draft guideline 3.1.5 or was additional to it. The criterion of importance of the provision within the general thrust of the treaty and the gravity of the impact needed further clarification since it was open to subjective interpretation.

(v) Guideline 3.1.13 — Reservations to treaty provisions concerning dispute settlement or the monitoring of the implementation of the treaty

51. It was stated that the guideline should be supplemented with a provision on the unacceptability of reservation to "diplomatic" means of settling international disputes.

52. According to another view, the guideline appeared to be redundant in a view of guidelines 3.1.5 and 3.1.6.

3. Effect of prohibited or invalid reservations

53. According to several delegations a prohibited reservation was without legal effect. Whereas on the one hand the intention of the relevant State to become a party to the treaty had to be respected, on the other hand that State also had to respect the conditions under which it could become a party. Consequently if a reservation was regarded as null and void, the consent to be bound by the treaty was not affected by the illegality of the reservation.

54. It was also observed that a growing number of States were developing the practice of severing invalid reservations from the treaty relations between the States concerned, a practice that was contrary to article 19 of the Vienna Convention. Account should be taken of the will of the reserving State concerning the relationship between ratification and the reservation. The basic expression of consent to be bound by the treaty should be presumed to take priority over the reservation (since the latter was considered null and void) unless a reserving State explicitly made ratification dependent on its reservation. Although one should be cautious in allowing different regimes depending on the nature of each treaty, the specific character of normative multilateral treaties such as human rights treaties might warrant a separate approach.

55. Other delegations observed that legal effects of invalid reservations were not clear from articles 19 to 23 of the Vienna Convention. However, the invalidity of a reservation could not lead to the assumption that the treaty was fully binding on the reserving State.

56. The view was expressed that the Vienna Convention reflected a compromise between the desirability of maintaining in force all provisions of a treaty not affected by the reservation and the right of the objecting State not be bound by a reservation against its will. Any change in the system would have to consider whether and under what circumstances a State formulating an invalid reservation could be considered to be bound by the provisions to which the reservation had been made without violating the principle of the sovereign equality of States.

57. According to another view, once a reservation was determined to be invalid, following objections by several of the contracting parties, the reserving State should not be considered bound by the treaty with the exception of human rights, humanitarian law treaties and treaties relating to the law of armed conflict.

58. It was also observed that the question of consequences of invalid reservations was one of the most difficult problems for the law of treaties. Such issues should be resolved primarily through the objections and acceptances communicated by States to the reserving State. The consequences of a finding by a monitoring body depended on the recognized authority of that body.

59. If a reservation incompatible with the object and purpose of the treaty could completely invalidate the consent of the reserving State to be bound by the treaty, it would appear that such a "solution" was opposed to both the will expressed by the reserving State and to the freedom of the objecting State to choose whether or not the treaty should enter into force between itself and the reserving State. If the objections did not prevent the entry into force of the treaty, emphasis was given on the contractual link thus established and the "reservations dialogue". Such a solution, although sometimes unsatisfactory or having few practical effects, respected the international legal system. A reservation might not be valid but the law of treaties could neither deprive a reservation of all its effects by recognizing the possibility of "super-maximum" objections nor restrict the consent of a State to be bound by a treaty on the grounds that its reservation was incompatible with the treaty from the moment that the objecting State consented to maintain a contractual relationship with it.

60. It was observed that if a State objected to reservations without opposing the treaty's entry in force between it and the reserving State, it considered that the effect was to exclude application of the relevant provision to the extent of the reservation. In some cases, the effect could be the same as the effect of admitting the reservations. However, there should be limitations on what each State was able to do under the objections system.

B. Shared natural resources

1. General remarks

61. Delegations affirmed the importance that they attached to the consideration of the topic by the Commission, with some stressing their particular interest in the question of shared groundwaters. While existing legal instruments concluded under the auspices of regional economic or river commissions or at the community or bilateral levels adequately covered certain aspects, some delegations noted a willingness to share experiences in the elaboration of an instrument within the context of the United Nations.

62. Generally, delegations viewed positively the draft articles on the law of transboundary aquifers, adopted by the Commission on first reading in 2006, with several noting a readiness to submit detailed comments of their Governments, as requested by the Commission. At one level, it was noted that the draft articles established a continuum between the legal regime concerning surface transboundary waters and that applicable to transboundary aquifers and struck a good balance between the competing interests for groundwaters, including between their uses and preservation, while at another level there was still room for improvement. It was suggested that some of the draft articles needed to be reviewed in order to take into account provisions in other instruments such as the Convention on the Protection and Use of Transboundary Watercourses and International Lakes and the International Law Association's Helsinki Rules (1966), as updated by the Berlin Rules on Water Resources (2004). Moreover, it was important to elucidate in the draft articles the differences between surface water and groundwater with respect to flow, as well as characteristics of storage and water quality. On one broader view, the Commission should seek to achieve an outcome that reflected the emerging idea that access to drinking water of sufficient quantity and quality might constitute a

human right and that utilization of groundwaters should take into account the needs of future generations. On this view, any damage to an aquifer belonging to one particular State, even if it was caused by that State only, should be a matter of international concern. The point was also reiterated that some of the obligations did not constitute a codification of customary law or reasonable progressive development of that law.

63. The initiative by the United Nations Educational, Scientific and Cultural Organization (UNESCO) to sensitize Governments on the draft articles was welcomed by some delegations, noting, however, that such an initiative could not bring real added value unless it benefited all regions of the world.

64. In terms of the timelines for completion, delegations supported the indication that the Commission would proceed to a second reading of the draft articles in 2008. Some delegations also supported the suggestion that the law on transboundary aquifers should be treated independently of any future work by the Commission on issues related to oil and gas.

65. In support of such separate treatment a number of points were reiterated or arguments advanced. It was noted that (a) despite the similarities between aquifers and oil and natural gas, the differences were more significant, in particular water resources were in movement, as in rivers, and energy resources were basically static and water resources directly affected the ecosystem as a whole, cutting across borders; (b) groundwater provided more than half of humanity's freshwater needs and was a life-supporting resource of mankind; (c) the challenges of managing groundwater, including the environmental impact and effects, as well as commercial considerations that were implicated, were quite different from those related to oil and gas; (d) while oil and gas were strategically important to a country's economic and social development, they did not constitute "a vital human need"; (e) the prospecting, exploration and exploitation of energy resources were a more complex endeavour; (f) the gathering assessment of State practice on oil and gas would take a relatively long time; (g) the draft articles on aquifers would not necessarily apply to oil and gas; and (h) work on aquifers would be helpful in determining the potential direction, substance and value of any work that could be carried out by the Commission on oil and natural gas.

66. The point was also made, stressing that in future it would be difficult to avoid the influence of work on a set of draft articles on one category of resources over another. Accordingly, it was important not to reject a priori any possible links in the development of work in respect of various resources. Indeed, it was suggested that a final decision on adopting separate texts should be deferred until a later stage.

67. Another viewpoint did not find the arguments for separation offered in the Commission to be persuasive. For example (a) that there was a looming prospect of a water crisis that required the urgent formulation of an international legal framework was countered by the fact that several international legal frameworks already existed to address such a crisis, including the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses, which, together with other international legal frameworks, also covered aquifers; (b) while it was true that freshwater was a resource vital for the human being for which no alternative existed, and that oil and gas were non-renewable resources, these considerations alone did not warrant separate treatment. Like groundwater, oil and gas were scarce resources of strategic importance to States; a similarity which might well prove

more significant in the formulation of legal rules; moreover, the current draft articles on aquifers covered both recharging aquifers and non-recharging aquifers, and the latter were, like oil and gas, a non-renewable resource; and (c) while the environmental concerns associated with the resources called for different rules, such rules did not necessarily require a different legal framework. Special rules for aquifers could be included in a common legal framework for shared natural resources. In this connection, the view was reiterated expressing preference for a more holistic approach rather than the current step-by-step approach taken by the Commission in the elaboration of the topic.

68. While supporting the separate treatment, the point was made that there was no urgency to deal with the question of oil and gas; and that there was need to bear in mind the work on transboundary aquifers. However, some other delegations preferred that the matter be treated as a priority. The point was made that although State practice in relation to oil and gas was scarce, there were some relevant cases that could provide the basis for an analysis. Thus, some delegations favoured conducting a preliminary study on oil and gas, including a compilation of State practice and the circulation of the Commission questionnaire in that regard received support. It was also observed that any future work would require the views of Member States before a definitive position was taken by the Commission.

69. While not opposed to the circulation of the questionnaire, some other delegations pointed out that they did not ultimately support the consideration of oil and gas by the Commission. The Commission was called upon to exercise caution when examining areas of international law in which States and industries had immense economic and political stakes in their allocation and regulation or which directly touched on matters of an essentially bilateral nature. Shared oil and gas deposits fell within those parameters, and were amenable to mutually agreed arrangements among States guided by pragmatic considerations based on technical information. Indeed, it was wondered by some delegations whether oil and gas as a topic was ripe for codification at all, as well as whether there was a pressing need for the Commission to elaborate the law on oil and gas resources.

70. Several other arguments were advanced in favour of such a cautious approach: It was noted that (a) oil and gas were of great strategic, economic and developmental importance; (b) States already had considerable experience in the area and there was no urgent humanitarian need to protect those resources; (c) the relevant State practice seemed to be too sporadic to elucidate the principles or even general trends; (d) the subject was linked to maritime delimitation, a topic outside the mandate of the Commission; and (e) the draft articles on the law of transboundary aquifers would not serve as a useful template for all transboundary resources.

71. While sceptical, some other delegations reserved their position.

72. On how oil and gas should be addressed, some delegations stressed that there was a need for a different approach, noting that the legal context was quite different, and that it was necessary in particular to bear in mind the Law of the Sea and the more specific legal regulations and arrangements in place at the bilateral and national levels. On one view, the subject should not be considered in isolation of the issue of maritime boundary delimitation, which also required in-depth study. On another view, the Commission should not deal with any matters relating to offshore boundary delimitation. Whether such resources were in fact physically shared was

primarily a question of the delimitation of territorial or maritime jurisdictions. In addition, delimitation agreements generally contained a unitization clause covering petroleum resources that straddled the agreed boundary. Some delegations attached importance to the application of equitable principles, as well as to the principle of unitization. Joint development agreements were a practical way to exploit transboundary oil and gas deposits. The *Handbook on the Delimitation of Maritime Boundaries*[2] published by the Division for Ocean Affairs and the Law of the Sea provided good illustrations of the principle. The sovereignty of a State over the natural resources located within its boundaries was a well-established principle of international law that was also stressed.

2. Specific comments on the draft articles on the law of transboundary aquifers

(a) Title

73. It was suggested that the title be changed to "Draft law on shared international aquifers".

(b) Draft article 1 — Scope

74. It was noted that the draft article did not adequately address the situation of an aquifer or aquifer system that crossed international boundaries but had no hydraulic connection to any surface water resources or had a hydraulic connection only to a river or lake located entirely within a single nation. It was also noted that the proposed scope if formulated loosely had the potential of unnecessarily restricting activities within the area of the aquifer or aquifer system. In particular, those activities that could have an adverse impact on aquifers or aquifer systems should be identified; and if that was not feasible, paragraph (b) of draft article 1 should be deleted.

(c) Draft article 3 — Sovereignty of aquifer States

75. Some delegations welcomed it, while also highlighting the importance of the principle of permanent sovereignty over natural resources, as reflected in General Assembly resolution 1803 (XVII) and seeking a direct reference to the principle in the draft articles or its robust articulation in the commentary. The reference to "It shall exercise such sovereignty in accordance with the present draft articles" was questioned; it seemed to run counter to principle 2 of the Rio Declaration on Environment and Development. It was argued that the aquifer located within the territory of a State was subject to its sovereignty, and the State was therefore free to determine the policy to be followed with respect to that aquifer. However, another viewpoint preferred to buttress the language by an explicit reference to "international law".

(d) Draft article 4 — Equitable and reasonable utilization

76. The principle of equitable utilization was considered as meriting inclusion in the draft articles. It was however suggested that the expression "equitable and reasonable use", also in draft article 5, was inappropriate, noting instead that an expression such as "equitable and sustainable use" would be more in keeping with contemporary environmental law. It was also observed that in paragraph (c) the

[2] United Nations publication, Sales No. E.01.V.2.

phrase "present and future needs" required clarification, as it was not clear what exactly it referred to. Instead, "the needs of present and future generations" was preferred.

(e) Draft article 5 — Factors relevant to equitable and reasonable utilization

77. It was observed that guidelines identifying the salient factors affecting different water uses might be useful; and that aquifer characteristics that determined groundwater quantity and flow should be covered in view of their relevance to equitable allocation. It was also suggested that the contribution to the formation and recharge of the aquifer or aquifer system, as a factor in determining the level of reasonable use of the transboundary aquifer by a State, required further clarification, particularly where an aquifer and its recharge zone were in different States. It was stressed that exceeding the limits of sustainable use would adversely affect the quantity and quality not only of aquifer water but also of the water in discharge zones located in the maritime environment. The point was also made that the draft article should follow closely the language of the comparable article of the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses to avoid a different or contradictory interpretation.

(f) Draft article 6 — Obligation not to cause significant harm to other aquifer States

78. The threshold of "significant harm" was viewed by some delegations as too high and uncalled for. The point was also made that the scope of the obligation not to cause significant harm was not clear. It was also necessary to define "significant harm", "impact" and "take all appropriate measures" and to state who should determine the measures to be taken.

(g) Draft article 7 — General obligation to cooperate

79. Some delegations attached particular importance to the draft article and the point was made that it was necessary to provide a clear definition of "equitable and reasonable utilization" and "appropriate protection" in draft articles 4 and 6 in order to ensure implementation of the obligation. Moreover, the use of the term "good faith" posed the danger that States might take measures in good faith that had not been negotiated with the other party and that could therefore have an adverse effect on the other party's needs.

(h) Draft article 8 — Regular exchange of data and information, and draft article 9 — Protection and preservation of ecosystems

80. It was observed that the term "readily available data and information" in article 8, paragraph 1, was unclear; the minimum level of data needed in order to assess the condition of the aquifer system and to ensure equitable and reasonable utilization should be stipulated. In connection with paragraph 2, it was suggested that a list of current practices and standards would be helpful to the aquifer States. There was also need for an additional clause to ensure consistent procedures for data collection. In relation to draft article 9, the value of its content was stressed.

(i) Draft article 10 — Recharge and discharge zones

81. The point was made that the phrase "minimize detrimental impacts" did not provide adequate protection. Moreover, careful attention should be given to recharge

and discharge zones and the prevention, reduction and control of pollution, as those aspects were key to sustaining acceptable water quality. It was also commented that where recharge or discharge zones were located in non-aquifer States, it would be difficult to impose any obligation on those States. It was nevertheless important to take into account the needs of all the States concerned and not simply those that had recharge zones located in their territories, including the development of standards for the protection of aquifers and the surrounding environment from pollution that were binding on all the States concerned.

(j) Draft article 11 — Prevention, reduction and control of pollution

82. The provisions of the draft article were viewed as valuable. However, it was observed that the threshold of "significant harm" was too high. Moreover, it was suggested that the precautionary approach should be strengthened by an explicit reference to the precautionary principle. It was also suggested that a clause requiring an aquifer vulnerability or risk assessment based on readily available hydrological and topographical data should be included in the draft article as a basis for the adoption of regulatory control measures.

(k) Draft article 12 — Monitoring

83. The suggestion was made that there should be an additional clause indicating that the aquifer States, following consultation among themselves, would formulate the objectives of monitoring, on the basis of which the monitoring system and parameters to be monitored would be decided.

(l) Draft article 13 — Management

84. Some delegations attached particular importance to the draft article, noting also that it was linked to draft articles 4, 9, 10 and 11; and that a general clause was necessary to affirm such a linkage, as well to stress the need for aquifer States to cooperate in harnessing the resources of transboundary aquifers.

(m) Draft article 14 — Planned activities

85. A concern was expressed that the draft article left open the possibility that an assessment of the possible effects of a particular planned activity could be left to a single party, instead of all the States concerned. It was suggested that the term "significant adverse effect" should be clarified. It was also pointed out that if the draft articles would take the form of a convention, a dispute settlement mechanism going beyond the provisions of paragraph 3 would be necessary and similar provisions in the 1997 Convention could be used as a model.

(n) Draft article 16 — Emergency situations

86. The point was made that the phrase "causing serious harm" was imprecise and needed to be clarified.

(o) Draft article 18 — Data and information concerning national defence or security

87. It was pointed out that standards should be developed for the exchange of data and information essential to national defence or security as distinct from information required for aquifer-related studies and research. The point was also

made opposing the inclusion of any reference in the draft articles to the protection of industrial secrets; such a provision could be used as a pretext to conceal information about industrial activities that polluted groundwaters or to draw excessive amounts of water. Similarly, there should be no reference to the protection of intellectual property rights in connection with the exchange of information and data on groundwaters, since such a provision might enable upstream aquifer States to introduce unfair charges for data provided to downstream States.

(p) Draft article 19 — Bilateral and regional agreements and arrangements

88. This draft article was considered particularly valuable by some delegations. It was also pointed out that it would be necessary on second reading to resolve the questions of the relationship between the draft articles and other agreements, existing and future, on the management and protection of transboundary aquifers, as well the obligations of States other than aquifer States. Without any real incentives for non-aquifer States to join, since draft articles 7, 8, 9, 11, 12 and 13 only applied to aquifer States, it was likely that only aquifer States would become parties to such an instrument.

3. Final form

89. With regard to the final form, divergent views were expressed. The point was made that a final decision on the form should not be made in a hurry, noting for example that such a decision should be deferred until after the second reading of the draft articles. The viewpoint was also expressed that the real test of the final instrument rested on the actual impact that such an instrument would have on relations among States that shared natural resources, as well as its positive influence on the implementation of domestic legislation.

90. For some delegations, the draft articles could lead to the adoption of model principles in the form of a model convention that could be used at the bilateral or regional level. Such a solution would make it easier to respond to the different situations and specific needs of different States. On the other hand, some other delegations favoured a framework convention. It was suggested that such a framework convention would have more value than a model convention and be of greater benefit than a non-binding resolution or simply a report by the Commission.

91. It was also pointed out that context-specific arrangements as opposed to a global framework convention were the best way of addressing pressures on groundwaters. However, in the event a framework convention would be the preferred option, it was necessary that care be taken not to supersede existing bilateral or regional arrangements or to limit the flexibility of States to enter into such arrangements.

92. For some other delegations, the adoption of a convention, particularly if it was not ratified or not wholly supported, could paradoxically reduce the usefulness of the draft articles. Accordingly, some delegations favoured a non-binding declaration of the General Assembly, setting out general principles that would guide States in the framing of regional agreements or a set of recommendatory principles and would represent an authoritative statement of the international standards and best practice, which should be followed and given practical effect at the bilateral and regional levels, or a non-binding instrument in the form of guidelines or a set of model principles.

93. It was also argued that to the extent that the Commission continued to adopt a step-by-step approach the adoption of a non-binding instrument might merit consideration as a first step in the development of an adequate international legal framework for the use of shared natural resources.

C. Expulsion of aliens

1. General remarks

94. Delegations commended the second and third reports of the Special Rapporteur (A/CN.4/573 and A/CN.4/581) and emphasized the importance, timeliness and complexity of the topic, in particular in the light of the rising phenomena of illegal immigration and refugee flows, and in the context of the fight against terrorism. Appreciation was also expressed for the study prepared by the Secretariat (A/CN.4/565 and Corr.1).

95. The view was expressed that the Commission should elaborate a general regime on the expulsion of aliens, without prejudice to existing special rules. While it was proposed that the Commission conduct a study of national laws, it was also stated that the Commission should focus its work on certain international standards. A preference was expressed for the elaboration of a set of principles instead of draft articles. It was also proposed that the Commission produce only a study of State practice without attempting to codify that practice. Furthermore, it was observed that the Commission should keep its options open concerning the possible outcome of its work on this topic.

96. Some delegations raised doubts as to the suitability of the topic for codification. It was also stated that this topic should have been dealt with by other bodies such as the Office of the United Nations High Commissioner for Refugees or the Human Rights Council.

2. Scope of the topic

(a) Scope *ratione personae*

97. While support was expressed for a draft article listing the categories of aliens to be covered, it was also proposed that draft article 1 should rather enumerate the categories of aliens to be excluded from the scope of the draft articles.

98. Support was expressed for covering aliens legally or illegally present in the territory of the expelling State. Nevertheless, some delegations stressed the importance of taking into consideration, in the elaboration of a legal regime, the legal status of the alien concerned.

99. Some delegations favoured the exclusion of aliens entitled to privileges and immunities under international law, including diplomats and members of armed forces, from the scope of the topic.

100. Divergent views were expressed on the inclusion of refugees and stateless persons. Some delegations supported the elaboration of draft articles on refugees and stateless persons. While, according to one viewpoint, the draft articles should be consistent with the relevant provisions of the 1951 Convention relating to the Status of Refugees and the 1954 Convention relating to the Status of Stateless Persons, another view pointed to the potential gaps and inadequacies of the existing regimes.

Some other delegations did not favour the elaboration of draft articles on refugees and stateless persons, who were already covered by conventional regimes. It was stated that a reference to the relevant conventions would suffice, and it was also suggested that a "without prejudice" clause be included in the draft articles. According to another view, the Commission should encourage a wider ratification of, or possible amendments to, the relevant conventions, while also stating in the draft articles that the general rules governing the expulsion of aliens were applicable to refugees and stateless persons in so far as they offered them additional guarantees.

101. Some delegations raised doubts as to the need for elaborating draft articles dealing specifically with migrant workers and members of their families.

(b) Scope *ratione materiae*

102. While several delegations were of the view that non-admission should be excluded from the scope of the topic, a preference was expressed for also covering aliens finding themselves in zones of immigration control. It was also stated that the removal of illegal aliens should be excluded from the scope of the topic. Some delegations favoured the exclusion of extradition as well as the transfer of criminals.

103. Some delegations were of the view that the Commission should not deal with expulsions in time of armed conflict. It was suggested that a "without prejudice clause" preserving international humanitarian law be included in the draft articles. According to another view, international humanitarian law instruments did not provide a comprehensive regime for the expulsion of aliens in time of armed conflict.

3. Definitions

104. It was suggested that the definition of "alien" be explicitly limited to natural persons. Several delegations favoured a definition of the term "alien" as opposed to a "national" rather than a "*ressortissant*", the latter term being too broad and imprecise.

105. A proposal was made to include in the draft articles a definition of the terms "refugee" and "stateless person". It was suggested to retain a broad definition of the term "refugee" that would include de jure as well as de facto refugees.

106. It was stated that the proposed definition of "expulsion" would need to be reconsidered to the extent that it included State conduct other than a formal act ("*acte juridique*"). The definition should also be reviewed to clarify that it did not cover extradition.

107. Divergent views were expressed on the need for a definition of the terms "territory" and "frontier". In particular, some delegations viewed a definition of "frontier" as unnecessary. A call was made for a more precise definition of the term "territory" that would refer to "a State's land territory, internal waters and territorial sea, and its superjacent airspace, in accordance with international law".

108. It was suggested that draft article 2 also include a definition of "collective expulsion" which could be based on the definition provided by the European Court of Human Rights in the *Conka v. Belgium* case.[3]

4. The right to expel and its limitations

109. Many delegations, while recognizing the right of a State to expel aliens from its territory, emphasized the need to respect the relevant rules of international law, in particular those relating to the protection of human rights and to the minimum standard for the treatment of aliens. According to another view, the right to expel was to be considered as "the principle", while limitations on this right were to be regarded as "exceptions".

110. Some delegations favoured a more precise enunciation of the limitations referred to in draft article 3. In particular, the reference to "fundamental principles" was considered to be imprecise. It was proposed to insert in this draft article a reference to the limitations arising from the protection of human rights.

111. The unlawfulness of an expulsion to a State where there were reasons to believe that the alien would be subject to the risk of torture or other cruel or inhuman treatment or punishment was emphasized. Some delegations stressed the prohibition of discriminatory expulsions. The necessity of avoiding arbitrary expulsions was also underlined. Reference was made to the right of return of aliens whose expulsion was subsequently found unlawful by a competent authority.

5. Expulsion of nationals

112. Several delegations expressed support for the prohibition of the expulsion of nationals. The prohibition was unconditional, and the reference to possible exceptions in draft article 4 should be deleted. It was also stated that the reference to exceptional reasons possibly justifying the expulsion of nationals would not serve the purposes of progressive development of international law. Some other delegations observed that any exception to this prohibition should be narrowly construed. It was emphasized that the expulsion of nationals must not be arbitrary or violate international human rights law.

113. According to some delegations, the Commission should consider the legal situation of dual or multiple nationals with regard to their possible expulsion. Some delegations also referred to the issue of deprivation of nationality as a prelude to expulsion, and it was stated that draft article 4 should explicitly exclude that possibility as a means to circumvent the prohibition of the expulsion of nationals. However, some reservations were expressed on the inclusion of such questions, as well as the expulsion of nationals, within the present topic.

6. Refugees and stateless persons

114. Several delegations emphasized the need to ensure consistency of the draft articles on refugees and stateless persons with the provisions of the relevant conventions.

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[3] *Case of Conka v. Belgium*, Judgement, 5 February 2002, Application No. 51564/99, para. 59: "any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group".

115. While it was observed that draft articles 5 and 6 appeared to be consistent with the 1951 and 1954 conventions, some delegations proposed that a reference be made in the draft article on refugees to the principle of *non-refoulement* and, in particular, to the principle according to which a State must not expel an individual to a State in which he or she would be subject to the risk of torture. It was also proposed that new forms of protection, such as "temporary" or "subsidiary" protection, be taken into account by the Commission.

116. A proposal was made to include in draft article 5 a reference — corresponding to that contained in draft article 6 with respect to stateless persons — to the obligation of the expelling State to allow the refugee expelled a reasonable period within which to seek legal admission into another country. Support was expressed for the proposal, in draft article 6, that the host State intervene in the search for a receiving State when expelling a stateless person.

117. Several delegations were opposed to the inclusion of an explicit reference to terrorism as a possible ground for expelling a refugee or a stateless person, since terrorism was covered under "national security" or "public order" grounds, and because of the lack of a universal definition of terrorism. It was suggested that an explanation to that effect be provided in the commentary. Some other delegations favoured an explicit reference to terrorism and pointed to the vagueness of the term "national security". In this connection, a preference was expressed for using the term "counter-terrorism". It was also proposed that a reference be made to specific crimes as defined in widely accepted multilateral instruments relating to terrorism.

7. Collective expulsions

118. Support was expressed for the definition of "collective expulsion" contained in draft article 7. However, a call was made for a more accurate formulation of the definition in the light of the close link between the definition of "collective expulsion" and its prohibition. It was noted that the key element was qualitative and not quantitative, and reference was made in this context to the principle of non-discrimination and to relevant procedural guarantees.

119. Several delegations supported the prohibition of collective expulsions, notably in the light of the relevant international instruments relating to the protection of human rights. It was observed that such a prohibition also existed in time of armed conflict. According to another view, there was presently no universal rule prohibiting the collective expulsion of aliens. It was also stated that mass expulsions, as well as individual expulsions, should be based on objective reasons.

120. With respect to collective expulsions in time of armed conflict, some doubts were expressed on the exception envisaged in paragraph 3 of draft article 7, in particular on its compatibility with international humanitarian law. Support was expressed for clarifying that paragraph 3 only applied to aliens who were nationals of a State engaged in an armed conflict with the expelling State, and that collective expulsion should be limited to aliens who were, collectively, clearly engaged in activities hostile to the expelling State. Concern was expressed about the possibility of justifying the collective expulsion of the nationals of an enemy State by invoking the need to protect them from the local population or the need to protect the latter. It was suggested that, in time of armed conflict, the term "temporary removal" was more appropriate than "expulsion".

121. Conflicting opinions were expressed on the appropriateness of including in the draft articles a separate provision enunciating the prohibition of the collective expulsion of migrant workers and members of their families.

D. Effects of armed conflicts on treaties

1. General remarks

122. The comment was made on the fact that the work on the topic was limited to the possibility of suspension and termination of treaties, when, on this view, armed conflict could give rise to other more varied questions with respect to the law of treaties, including the application of the *clausula rebus sic stantibus* rule or the question of the consequences of non-performance. It was also suggested that a reference be included to international customary law as norms which maintain their legal force separate from that of provisions of the treaties possibly affected by armed conflict, for example, through the inclusion in the draft articles of the Martens Clause.

2. Draft article 1 — Scope

123. Support was expressed by some delegations for the provisional decision by the Working Group not to include treaties involving international organizations within the scope of the draft articles. It was also suggested that issues related to the status of the member States of an international organization (which are in a situation of armed conflict), treaty relations between such States and the organization itself or the effect of conflict on the founding treaty of the organization, should likewise be deferred. In terms of another view, international organizations should be included as it seemed unnecessary to divide the topic, as had been done with respect to the law of treaties or international responsibility.

124. It was further suggested that the Working Group's proposal that the draft articles should apply "to all treaties between States where at least one of which is a party to an armed conflict", should be clearly reflected in the provision itself. However, the Commission was advised not to underrate the distinction between conflicts occurring between two parties to a treaty and conflicts only involving one party to a treaty, since while the former scenario was excluded from the purview of the Vienna Convention on the Law of Treaties of 1969 the general rules on the termination and suspensions of treaties could arguably apply to the latter. It was also suggested that the outbreak of hostilities affected treaties in force as well as those being applied provisionally, under article 25 of the Vienna Convention, in the same manner. It was also proposed that draft articles 1 and 2 be combined as they both dealt with matters of scope.

3. Draft article 2 — Use of terms

125. Some delegations expressed support for the Working Group's proposal to broaden the concept of an armed conflict to cover internal conflicts which reach a "certain threshold of intensity". It was noted that a broadened definition inevitably made higher demands on the draft articles, notably in terms of differentiation and detail. In terms of another view, the criterion of intensity lacked specificity and could be abused in practice, and could undermine the stability of treaties. It was cautioned that the impact of such conflicts on treaties between States would be the

crucial factor to be considered, rather than the frequency of internal armed conflicts. While support was likewise expressed for the inclusion of situations of occupation, it was pointed out that "armed conflict" and "occupation" were not synonymous and merited separate treatment. Suggestions for formulations included the definition in the *Tadić* judgement[4] as well as that in the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflicts, and defining armed conflict by reference to common articles 2 and 3 of the 1949 Geneva Conventions.

126. Some other delegations opposed the inclusion of internal armed conflicts, preferring to limit the topic to only international armed conflicts, since a qualitative difference existed between the two making it not feasible to develop one set of rules applicable to both types of conflict. It was also recalled that article 73 of the Vienna Convention only referred to the "outbreak of hostilities between States". It was also noted that, while non-international armed conflicts may adversely affect the ability of the concerned State to fulfil its treaty obligations, that situation could be dealt with in accordance with draft articles on Responsibility of States for internationally wrongful acts, of 2001, in particular under Chapter V, Circumstances precluding wrongfulness.

127. It was queried why the Commission sought to define the term "armed conflict" instead of keeping with the term "hostilities" as contained in article 73 of the Vienna Convention. It was also suggested that resort could be had to the phrase "state of belligerency" to include situations where a formal declaration of war has not been made.

4. Draft article 3 — Non-automatic termination or suspension

128. General support was expressed for the principle of continuity of treaty obligations in the event of an outbreak of an armed conflict, which was considered essential in safeguarding security in legal relations between States. While support was also expressed for the new formulation of the provision, in terms of a further view, greater clarification was needed, possibly in a separate draft article, as to the precise legal nature of the effect of armed conflicts on treaties susceptible to termination or suspension. A preference was also expressed for reverting to the term "ipso facto". It was noted that the term "necessarily" would lead to uncertainty, whereas "ipso facto" would require a certain procedure modelled on articles 65 to 68 of the Vienna Convention, even if such a procedure would be hard to imagine in a situation of armed conflict. In terms of a further suggestion, the relevant phrase in the chapeau to draft article 3 could be rendered as "does not automatically lead to the termination or suspension, as the case may require, of treaties".

129. It was further noted that the draft article did not provide sufficient clarity on which consequence was to be preferred between suspension and termination. Furthermore, opposition was expressed to a suggestion, raised in the plenary debate in the Commission, to make the general rule in draft article 3 subject to the legality of the armed conflict under international law.

[4] International Tribunal for the Former Yugoslavia, *The Prosecutor v. Duško Tadić a/k/a "DULE"*, Judgement, Case No. IT-94-1, Appeals Chambers, 15 July 1999, para. 84.

5. Draft article 4 — The indicia of susceptibility to termination or suspension of treaties in the case of an armed conflict

130. Several delegations welcomed the new formulation for draft article 4 proposed by the Working Group. It was reiterated that the intention of the parties was not necessarily the best guide, and other criteria should be taken into account as had been proposed by the Working Group, in particular the actual effect of the armed conflict on the application of the treaty. Accordingly, the decision to terminate or suspend a treaty should be made on a case by case basis, taking into account all relevant factors that have a bearing on the continued application of the treaty. It was also noted that it was questionable whether the intention of the parties could be deduced by application of articles 31 and 32 of the Vienna Convention, since both provisions focus on the interpretation of the wording of the treaty and not on that of the intention of the parties. Doubts were however expressed as to the criterion of the number of parties to the treaty.

131. Some other delegations reiterated their support for applying the test of the intention of the parties at the time the treaty was concluded, as the main criterion. It was recalled that both domestic and international tribunals were regularly required to ascertain the intention of States. It was also proposed, by way of a possible solution, to delete the phrase "at the time the treaty was concluded".

6. Draft article 5 — Express provisions on the operation of treaties, and draft article 5 bis — The conclusion of treaties during armed conflict

132. The view was expressed in support of draft article 5 and 5 bis. In terms of another view, draft article 5 bis was redundant.

7. Draft article 6 bis — The law applicable in armed conflict

133. Most delegations expressed support for the decision to delete draft article 6 bis. It was noted that the question of the relationship between the law applicable in armed conflict and other treaties was complex and best not dealt with in the draft articles. It was suggested that the substance of the provision could be dealt with in the commentaries, as was proposed by the Working Group. A further delegation expressed the view that the commentaries should indicate that international humanitarian law is the *lex specialis* that governs in armed conflict.

134. In terms of a further view, some clarification was needed in the draft articles of the role of international humanitarian law in forming the *lex specialis*, and it was suggested by another delegation that a general article be included to cover such matters as human rights law, environmental law and the law applicable in armed conflicts. Another delegation expressed support for including the provision, albeit reformulated to clarify that the extent to which the law applicable during an armed conflict would exclude the application of human rights or environmental law treaties would have to be determined on a case-by-case basis, in the light of all the circumstances.

8. Draft article 7 — The operation of treaties on the basis of necessary implication from their object and purpose

135. Several delegations expressed support for the reference to the "subject matter" of a treaty in draft article 7, paragraph 1, as proposed by the Working Group, instead

of its "object and purpose". It was further pointed out that, if the "object and purpose" test were to be retained, it would be useful to align it with the relevant guidelines adopted under the topic "Reservations to treaties".

136. As regards the list, in paragraph 2, of categories of treaties that would continue in operation during an armed conflict, it was pointed out that particular provisions could nonetheless become inoperative during an armed conflict without the treaty as a whole being suspended or terminated. It was further suggested that the list include treaties codifying rules of *jus cogens* and treaties and agreements delineating land and maritime boundaries which by their nature also belong to the category of permanent regimes. It was also suggested that treaties that expressly apply in case of or during an armed conflict, and, accordingly, cannot be terminated by an armed conflict, should be identified and considered separately from other treaties. Some delegations supported the inclusion of the list in an appendix to the draft articles, as proposed by the Working Group. In terms of another suggestion, the list of categories could be included in draft article 4. Alternatively, it was proposed that the subject matter of the list of categories of treaties could be dealt with in the commentaries.

137. Some other delegations reiterated their preference for a generic approach to identifying categories of treaties, including the possibility of defining criteria, or identifying subject matter, for ascertaining whether a certain treaty necessarily continued in operation during an armed conflict.

138. Support was also expressed for the proposal of the Working Group to locate paragraph 1 closer to draft article 4, and it was suggested that it be placed between draft articles 5 and 5 bis.

9. Draft article 8 — Mode of suspension or termination

139. The view was expressed that further consideration was necessary on the consequences of the application of articles 42 to 45 of the Vienna Convention on the mode of suspension and termination, so as to ascertain whether those provisions are amenable to the context of suspending or terminating treaties in the event of an armed conflict. It was suggested that alternative modes, especially simplified modes, should be further explored, and that consideration should also be given to developing separate procedures for suspension and termination.

10. Draft article 9 — The resumption of suspended treaties

140. It was suggested that the Commission follow the relevant formulation of the resolution of the Institute of International Law, adopted in 1985, for draft article 9. In terms of another view, the proposal of the Special Rapporteur was acceptable, although subject to resolution of the problem of ascertaining the intention of the parties at the time the treaty was concluded in draft article 4. A further view was expressed doubting the necessity of draft article 9, in the light of draft article 3.

11. Draft article 10 — Effect of the exercise of the right to individual or collective self-defence on a treaty, and draft article 11 — Decisions of the Security Council

141. Support was expressed for the Working Group's suggestion that draft articles 10 and 11 be modelled after the relevant provisions of the 1985 resolution of the Institute of International Law, and that, accordingly, deference should be given to

the different legal positions, under the Charter of the United Nations, of the aggressor State and the State subject to aggression. It was also suggested that the recent practice of the Security Council should be taken into account, and that due consideration should be given to the question of the position of States which are not members of the United Nations. At the same time, the point was made that since the purpose of the draft articles were to support the stability of treaty relations, greater limits on the discretion to suspend treaties were preferable.

142. In terms of an opposing view, it was more appropriate to limit the draft articles to the law of treaties since the question of the illegality (or not) of the use of force did not affect the question whether an armed conflict had an automatic or necessary outcome of suspension or termination.

12. Draft article 12 — Status of third States as neutrals, draft article 13 — Cases of termination or suspension, and draft article 14 — The revival of terminated or suspended treaties

143. It was queried whether, given their expository nature, draft articles 12 to 14 were strictly necessary. As regards draft article 12, it was noted that the provision would be rendered redundant if the phrase "as neutrals" were to be deleted, as had been suggested by some members of the Commission in its plenary debate.

E. Responsibility of international organizations

1. General remarks

144. Delegations commended the Commission and the Special Rapporteur for the 15 draft articles provisionally adopted in 2007. Some delegations expressed support for the method consisting in following the pattern of the articles on responsibility of States for internationally wrongful acts, while including in the draft, where appropriate, provisions specific to the situation of international organizations. Some other delegations, however, cautioned against a wholesale application of the articles on State responsibility, which would not sufficiently take account of the diversity of international organizations and of their obligations in the context of a pragmatic approach. The inclusion of an article dealing with *lex specialis* was deemed necessary in that regard. On the other hand, some delegations commended the level of generality of the draft articles, and warned against a logic of non-accountability on the grounds of an organization's specificities.

145. As to the method followed by the Commission, the wish was expressed that views of States be better taken into account, while the proposal to have some issues revisited by the Commission before the end of the first reading in the light of comments received met with some support. It was suggested that the draft articles should be supported by more references to their relevant legal and factual basis; in this respect, the need to provide the Commission with further examples of practice and case law was emphasized, as they seemed insufficiently available.

146. As to the substance of the draft articles, some delegations drew attention to some issues of definition, and of recognition of the international legal personality of an international organization by an injured party. The exercise of the right to self-defence by international organizations also raised concerns.

147. Some delegations mentioned the decision of the European Court of Human Rights of 2 May 2007 in the cases *Agim Behrami and Bekir Behrami v. France* and *Ruzdi Saramati v. France, Germany and Norway*,[5] which contained interesting developments regarding the attribution of conduct to an international organization and to States in the specific context of peacekeeping operations.

2. Comments on specific draft articles relating to Part two — Content of the international responsibility of an international organization

(a) Chapter I — General principles

148. In respect of the content of the responsibility of an international organization, delegations perceived no reason to depart from the text of the corresponding articles on State responsibility, as it clearly appeared that an international organization would have to face the same obligation of full reparation and cessation of its wrongful act that was incumbent upon a responsible State. It was however noted that further examples of assurances and guarantees of non-repetition were needed in the case of international organizations and that the Commission should give consideration to designing a reasonable reparation scheme in those instances where the organization was to be held solely responsible for the wrongful act.

(b) Draft article 35 — Irrelevance of the rules of the organization

149. While it was suggested that draft article 35 should be revised in consideration of the international character of the rules of an international organization, the principle of irrelevance of such rules to the obligation of reparation incumbent upon the organization, together with the exception regarding the relationship between an organization and its members, was welcomed by several delegations. It was noted in that regard that the exception embodied in draft article 35, paragraph 2, was justified by the very nature of international organizations.

(c) Draft article 36 — Scope of international obligations set out in this part

150. The importance of a provision along the lines of draft article 36, paragraph 2, preserving the rights that might accrue to persons or entities other than States and international organizations, was emphasized, as international organizations were increasingly involved in activities that could affect the rights of individuals.

(d) Chapter II — Reparation for injury

151. The general approach followed by the Commission regarding reparation for the injury caused by an internationally wrongful act was welcomed, especially as it seemed to reflect existing practice.

(e) Draft article 43 — Ensuring the effective performance of the obligation of reparation

152. For the sake of the effectiveness of the draft articles, support was expressed for the inclusion of an article stating that members of an international organization are required to provide it with the means for fulfilling its obligation of reparation.

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[5] Application No. 71412/01 and application No. 78166/01, see, generally, http://www.echr.coe.int/echr.

While it was indicated that draft article 43 reflected current practice without establishing a subsidiary responsibility for the members of the organization, it was also suggested that the provision should be considered as an element of progressive development of international law, which would be better formulated as a recommendation deprived of any mandatory wording, or that it should be placed under the general principles stated in chapter I of part two.

153. Some delegations considered that, in any event, the requirement to the members of the organization embodied in the provision could only exist under the rules of that organization, whereas others indicated that reliance on internal rules should not create the possibility of a member of the organization to escape its responsibility or otherwise delay the provision of full reparation. Attention was also drawn to the importance of draft articles 25, 28 and 29 in that particular respect.

154. Support was expressed for the proposal mentioned in the commentary to draft article 43, which seemed more appropriate in a text dealing with the responsibility of international organizations, where the risk to "pierce the corporate veil" should be avoided. It was however indicated that this alternative proposal was unnecessary, as already implied by the obligation of the organization to make reparation.

155. Alternatively, it was suggested to refer to the respective obligations of the responsible organization and its members. On the basis of practice and case law, it was recalled that members of the organization had, in any event, the obligation to cover its expenses; this, however, did not mean that members of the organization were jointly liable for the full amount of reparation due by the organization. The creation of an appropriate fund or insurance mechanism was referred to in that respect. It was also indicated that the specific role played by some members of the organization in the wrongful conduct adopted by the latter had to be taken into consideration.

156. Other delegations questioned the added value and the appropriateness of such a provision, especially if the requirement it embodied depended only on the rules of the organization. It was also mentioned in this regard that draft article 43 dealt essentially with obligations incumbent upon States; it might thus call into question the essence of the legal personality of the organization.

(f) Chapter III — Serious breaches of obligations under peremptory norms of general international law

157. While some delegations questioned the distinction drawn in the text between serious and other breaches of international law and suggested deleting the draft articles, support was expressed for the provisions dealing with the breach by an organization of an obligation under a peremptory norm. In this context, it was emphasized that the particular consequences envisaged in draft article 45 would have to be considered within the mandates conferred upon the organizations.

158. Whereas it was noted that members of an international organization should empower it to discharge its responsibilities in this context, it was emphasized that the situation envisaged in chapter III would raise difficult issues as far as the specific duties of the members of an international organization having seriously breached a peremptory norm were concerned. The view was also expressed that, in the interests of a comprehensive codification, the scope of this chapter should be revisited to deal with the consequences, for an international organization, of a

serious breach of a peremptory norm either by another international organization or by a State.

3. Comments on specific questions asked by the Commission on the topic as contained in chapter III of the Commission's report (2007)

159. As to the possibility for an organization to react to a breach by another organization of an obligation owed to the international community as a whole, several delegations indicated that it could be accepted, on the understanding that it should take due account of the specific mandate entrusted to the organization. It was also suggested that the possibility should be limited to organizations having competences in the area concerned or entrusted with the protection of certain interests of the international community. The necessity to transpose the articles on State responsibility in that particular respect was however questioned by other delegations.

160. Regarding the possibility for an international organization to resort to countermeasures and the restrictions that it would then face, some delegations perceived no reason to depart from the text on State responsibility, whereas others insisted upon the existence of a link between the organization and the right protected by the relevant obligation, or mentioned the possibility of restraining the exercise of countermeasures to the breach of treaty obligations. It was suggested that the possibility should be considered within the realm of the competences provided to the organization. Particular respect for the requirement of proportionality was also emphasized.

F. Obligation to extradite or prosecute (*aut dedere aut judicare*)

1. General remarks

161. Some delegations emphasized that the obligation to extradite or prosecute was aimed at combating impunity, by ensuring that persons accused of certain crimes be denied safe haven and be brought to trial for their criminal acts. It was noted that the application of that obligation should not compromise the jurisdiction of States or affect the immunity of State officials from criminal prosecution.

162. Some delegations welcomed the plan for further development of the topic proposed by the Special Rapporteur. Support was expressed for the idea that the Commission conduct a systematic survey of international treaties, national legislation and judicial decisions relevant to the obligation to extradite or prosecute, based on the information obtained from Governments. According to some delegations, the Commission should carry out this survey on a priority basis, before proceeding to the drafting of any articles on the topic. A number of delegations provided, during the debates, information on their laws and practice in the field, as requested by the Commission.

163. While it was pointed out that the Commission should examine the different modalities of the obligation to extradite or prosecute in international treaties, the view was expressed that, if the obligation only existed under international conventional law, draft articles on the topic might not be appropriate.

2. Customary character of the obligation

164. Some delegations expressed the view that the obligation to extradite or prosecute was only based on treaties and did not have a customary character. Some other delegations considered that the obligation had acquired customary status, at least for the most serious international crimes, or that it would soon attain such status in respect of such crimes. It was argued that the jurisdiction entrusted to international criminal tribunals to try certain serious international crimes provided evidence of the emerging customary status of the obligation to extradite or prosecute for those crimes. Some delegations emphasized that the question should be settled through an examination of the relevant State practice and supported further study of the issue by the Commission.

3. Crimes covered by the obligation

165. Some delegations suggested that the Commission should establish a non-exhaustive list of crimes covered by the obligation. Among the offences that could be included in such a list, some delegations mentioned, for instance, genocide, war crimes, crimes against humanity and torture, as well as terrorism and corruption. Some other delegations supported the proposal that the Commission limit itself to a determination of criteria for the identification of the crimes subject to the obligation (using, for instance, the concept of "crimes against the peace and security of mankind" or referring to the interests of the international community as a whole).

4. Scope and content of the obligation

166. According to some delegations, the definition of the scope of the obligation should remain at the centre of the study by the Commission. It was indicated that the obligation arose for the State when the alleged offender was located on its territory. It was also noted that, in case of concurring jurisdictions, priority should be given to the exercise of jurisdiction by the State on the territory of which the crime was committed or by that of the nationality of the alleged offender. Support was expressed for the Commission to examine, within the present topic, the scope and conditions of the obligation to prosecute, as well as the conditions of extradition (including under domestic law). Specific questions were also raised for further consideration by the Commission, such as the nature of the territorial link required to establish the applicability of the obligation.

167. Some delegations considered that the content of the obligation to extradite or prosecute, and in particular the relationship between the two options contained therein, should be interpreted in the context of each convention providing for that obligation.

168. It was suggested that, in studying the scope and content of the obligation, the Commission should consider in particular the relationship between the options to extradite and to prosecute. Some delegations emphasized the alternative character of the obligation, noting, for example, that the custodial State had discretion to decide which part of the obligation it would execute. Some other delegations rather pointed to the conditional nature of the obligation or noted that the option of extradition took precedence over that of prosecution.

5. Relationship with universal jurisdiction

169. Some delegations emphasized the link between the obligation to extradite or prosecute and the principle of universality (pointing, in particular, to their common purpose), suggesting that the Commission should not exclude a priori the existence of such a link. Some other delegations rejected the existence of such a link or considered that it was not substantial.

170. In that regard, some delegations were of the view that the concept of universal jurisdiction should not be the focus of the present study. While some delegations encouraged the Commission to analyse its relationship with the obligation to extradite or prosecute (either in a separate provision or in the commentary to the future draft articles), other delegations opposed this proposal. It was also argued that the Commission should clearly distinguish the two notions and that universal jurisdiction should be dealt with in the future draft articles only to the extent necessary for the study of the obligation to extradite or prosecute. The view was expressed also that extending universal jurisdiction could be an effective way to implement the obligation to extradite or prosecute; it was indicated, in that regard, that, in order to have the possibility to choose between the two options of *aut dedere aut judicare*, the State should ensure that it had jurisdiction over the relevant offences.

6. Surrender of suspects to international criminal tribunals

171. Some delegations welcomed the decision of the Special Rapporteur to refrain from examining further the so-called "triple alternative" (i.e., the surrender of the alleged offender to an international criminal tribunal). Some other delegations, however, continued to believe that the "triple alternative" raised particular issues that should be considered within the present topic. It was noted that States must, in any event, meet their obligations with respect to international criminal jurisdiction.

7. Draft article 1 proposed by the Special Rapporteur

172. Some delegations welcomed draft article 1 proposed by the Special Rapporteur. It was noted, however, that the provision raised a number of issues still to be addressed by the Commission and that it required further clarification. The references made therein to the "alternative" character of the obligation and to different time periods relating to the obligation were criticized by some delegations. A call was made for a further examination of the condition that the alleged offender be "under the jurisdiction" of the State; it was suggested, in that regard, that the draft articles should refer to persons present in the territory of the custodial State or under its control.

8. Final outcome of the work of the Commission

173. Some delegations indicated that they were flexible as to the final form of the outcome of the Commission's work. Some delegations pointed out that a decision on the matter would depend on the results of the Commission's subsequent examination of the topic.

G. Other decisions and conclusions of the Commission

174. The importance for the Commission of pursuing its efforts in close consultation with States was emphasized and it was encouraged to reflect, to a larger extent, their contributions in its work. Appreciation was expressed for the Commission's consideration of issues regarding its relations and interaction with the Sixth Committee.

175. Some delegations stressed the importance of enhancing the availability of the Commission's documentation, as well as the need to make its report more user-friendly. In that regard, the Commission's proposal to consider ways of improving chapters II and III of its report was welcomed. The view was also expressed that an a priori limitation on the length of the Commission's documentation could not be made in the light of its significance in the process of the codification and progressive development of international law. Some delegations also expressed support for the restoration of honorariums for the Special Rapporteurs.

176. The relevance and value of the legal publications prepared by the Secretariat were also emphasized. In particular, the latest (seventh) edition of *The work of the International Law Commission*[6] was welcomed, while anticipating its issuance in all official languages. Moreover, the need to further develop the website on the work of the Commission was noted.

177. The inclusion of two new topics in the Commission's programme of work received general support and it was pointed out that both topics held the promise of being of great practical value. In this regard, the necessity to carefully evaluate the practical needs of States and assess the timeliness of a topic to be considered by the Commission was recalled.

178. As regards the topic "Protection of persons in the event of disasters", it was suggested that the Commission should focus its work on areas that would have the most practical impact on mitigating the effects of disasters, including practical mechanisms to facilitate coordination of the provision of assistance and the access of people and equipment to affected areas. The point was also made that, in view of the preliminary stage of the study on the topic, it would be premature to make any decision on the final form of the outcome. The view was also expressed doubting whether the topic was appropriate for the codification or progressive development.

179. As regards the topic "Immunity of State officials from foreign criminal jurisdiction", a suggestion was made that work should focus on the codification of existing rules of international law. The view was expressed that State officials should be prosecuted in their national courts since this constitutes a manifestation of State sovereignty that had to be respected. In terms of another suggestion, the principles of criminal jurisdiction, and in particular the applicability of the principle of universal jurisdiction, should also be studied in the context of the topic since national judicial authorities would be required to establish requisite jurisdiction prior to initiating any case. It was also recommended that the Commission proceed with caution in its study of the topic.

[6] United Nations, Sales No. E.07.V.9.

180. A comment was also made stressing that that the seeming proliferation of new topics should not be at the expense of ensuring the completion of topics already under consideration.

181. Regarding the Commission's long-term programme of work, several delegations expressed support for the inclusion of the topic "most-favoured-nation clause". It was stressed that the consideration of the topic could play a valuable role in providing clarity to the meaning and effect of the most-favoured-nation clause in the field of investment agreements and that it would be particularly useful in the light of the Commission's earlier draft articles on the topic.[7] The particular importance of this topic for developing countries was emphasized and it was noted that the elaboration of model guidelines and commentaries on this subject matter would be of great use.

182. Some other delegations expressed doubt regarding the appropriateness and utility for the Commission to consider this topic, in particular since the most-favoured-nation regime is currently being developed in other forums, such as the World Trade Organization, or on a case-by-case basis.

183. Some delegations expressed support for including the topic "Subsequent agreement and practice with respect to treaties" in the Commission's long-term programme of work. It was observed that the practical value of the topic arose from the fact that treaties were interpreted and applied in an evolving context which raised the question whether and how far that affected existing law and obligations. However, doubt was also expressed as to whether the topic was sufficiently concrete and suitable for codification and progressive development. Furthermore, a delegation reiterated its proposals for inclusion in long-term programme of work made in the Sixth Committee during the sixty-first session of the General Assembly.[8]

184. As regards the Commission's sixtieth anniversary, general support was expressed for the recommendations made with respect to the commemoration and it was considered an excellent opportunity to raise awareness of the Commission's efforts among States and international organizations as well as to review the Commission's past, present and future work.

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[7] *Official Records of the General Assembly, Thirty-third Session, Supplement No. 10* (A/33/10), para. 74.

[8] For the proposals, see A/CN.4/577, para. 128.